30-420

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 213.

AMOS W. SHEPHERD, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED JANUARY 22, 1886.

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1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and the western division of the southern district of Ohio, begun and held at the court-rooms, in the city of Cincinnati, in said division and district aforesaid, on the first Tuesday in October, being also the sixth day of that month, in the year of our Lord one thousand eight hundred and eighty-five, and in the one hundred and tenth year of the Independence of the United States of America—present, the Honorable George R. Sage, one of the judges—among the proceedings had were the following, to wit:

AMOS W. SHEPHERD
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 2546.

Money.

Be it remembered that heretofore, to wit, on the fourteenth day of February, in the year of our Lord one thousand eight hundred and eighty, came the defendant aforesaid, by J. A. Collins, Esq., and Messrs. Hoadley, Johnson & Colston, its attorneys, and filed in the clerk's office of the court aforesaid in this cause the certain transcript of proceedings theretofore had herein in the court of common
2 pleas of said Belmont county, Ohio; and which said transcript so as aforesaid filed is clothed in words and figures as follows, to wit:

Transcript.

Pleas before the court of common pleas within and for the county of Belmont and State of Ohio, at a term thereof begun and held in the court-house of said county, at St. Clairsville, on the seventh day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

AMOS W. SHEPHERD

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY.

Be it remembered that on the 3rd day of July, A. D. 1871, came the plaintiff, Amos W. Shepherd, by his attorneys, D. D. T. Cowen and J. B. Smith, and filed in the clerk's office of the court of common pleas of Belmont county, Ohio, his certain petition against the Baltimore and Ohio Railroad Company, defendant; which said petition is in the words and figures following, to wit:

Petition.

THE STATE OF OHIO, *Belmont County:*

Court of Common Pleas.

AMOS W. SHEPHERD, Plaintiff,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendants.

Amos W. Shepherd, plaintiff, says that the defendant, The Baltimore and Ohio Railroad Company, is a corporation; that before and at the time of the committing by the defendant of the grievances hereinafter mentioned the plaintiff was and still is the
3 owner of certain lots in Bellaire city, in said county of Belmont, Ohio, namely, lot numbered 8, and 4 feet of the north side of lot 7, of block 1, upon which lots *are* and was built a certain large and commodious brick house, built and arranged, intended and used, for a hotel and store-room, and that said lots are bounded on the east by Water street, in said Bellaire city, and *is* for their length, to wit, 120 feet, within 33 feet of First street, in said Bellaire city, and that the said lots are bounded along the west end of same by a wide and commodious alley running through from Crescent street to First street, *of* said Bellaire city, and that the said streets and alley named are common and public highways in said Bellaire city, dedicated to a common and free use as public streets and highways; that by reason of the premises the plaintiff ought to have had and enjoyand still of right ought to have and enjoy, and the said lots and improvements ought to have had and still ought to have, the benefit and advantage of a free and unobstructed passage into, along, and upon the said streets and alley to and from his said lots and improvements; yet the defendant, knowing the premises, wrongfully, injuriously, and unjustly intending to injure the plaintiff and his said lots and improvements, and to deprive him of his right
4 to a full, free, safe, and unobstructed passage into, along, and upon the said streets and alley to and from his said lots, and to deprive him and his said lots and improvements of the benefit and advantage of the position of said lots and improvements—that the defendant, about the 1st of April, 1868, and on divers other days and times since that day, wrongfully, unlawfully, and injuriously and without the license of the plaintiff and against his will entered upon the said Water and First streets and made large excavations therein and in the immediate vicinity of his said lots and improvements, and commenced constructing and are still constructing large stone pillars in said streets and across the said alley and in the immediate vicinity of his said lot- and improvements, and are laying upon said pillars a railroad for the purpose of transporting over and along said streets by steam-engines and cars and carrying therein passengers, freight, and stock over and along and across said streets and alley and in the immediate vicinity of his said lots and improve-

ments; that the said stone pillars are of the length of 12 feet, thickness of 6 feet, height — 30 feet, and are about 27 feet apart, and that there are 2 of said stone pillars in said Water street and five in said First street and across said alley and in the immediate vicinity of said lots and improvements as erected by
5 said defendant, and the defendant was incumbering and obstructing the said streets and alley in the construction of said stone pillows in said streets during all the time aforesaid so as to deprive the plaintiff of his right to a free, safe, and unobstructed passage into, along, and upon said streets and alley, on foot and with his wagons, horses, and carriages, to and from the said lots and improvements, and so as to deprive the plaintiff of his right to the free, safe, and unobstructed use and benefit of said streets and alley at the place and places aforesaid, and so as to deprive his said lots and improvements of the advantage of their former position; that by reason of the premises the plaintiff's said lots and improvements have been and still are greatly injured and depreciated in value, and he has been and still is otherwise greatly injured, to his damage six thousand dollars.

Whereupon the plaintiff prays judgment against the defendant for $6,000.

D. D. T. COWEN AND
J. B. SMITH,
Att'ys for Plaintiff.

OHIO, *Belmont County:*

Amos W. Shepherd, being first duly sworn, says that he is plaintiff in this action, and that he believes the statements of this his foregoing petition to be true.

AMOS W. SHEPHERD.

6 Sworn to before me by Amos W. Shepherd and by him subscribed in my presence this 3rd day of June, 1871.

A. O. MELLOTT, *J. P.*

Præcipe.

AMOS W. SHEPHERD
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY.

Clerk Campbell:

Issue summons to sheriff of Belmont county, returnable according to law. The plaintiff claims judgment for $6,000.

D. D. T. COWEN &
J. B. SMITH,
Att'ys for Plaintiff.

Thereupon, on præcipe of the attorney for the plaintiff, there was issued out of the clerk's office of the court of common p-eas of said county a writ of summons to the sheriff of Belmont county, Ohio; which said summons with the endorsements thereon are in the words and figures following, to wit:

Summons.

THE STATE OF OHIO, }
Belmont County, } *ss:*

To the sheriff of Belmont county, Greeting:

You are hereby commanded to notify the Baltimore and Ohio Railroad Company that it has been sued by Amos W. Shepherd in the court of common pleas of said Belmont county, and that unless it answer by the 5th day of August, A. D. 1871, the petition of said Amos W. Shepherd against it filed in the clerk's office of said court the said petition will be taken as true and judgment rendered accordingly. You will make due return of this summons on the 17th day of July, 1871.

7 Witness my signature and the seal of said court, at St. Clairsville, in said Belmont county, this 3d day of July, A. D. 1871.

J. C. PRATT, [SEAL.]
Dept. Clerk of said Court.

Endorsed: "Plaintiff claims judgment for $6,000.00."

Said summons was returned and filed July 17, 1871, endorsed:

Return.

"Rec'd this writ July 3rd, 1871, and, not finding the president or other chief officer, cashier, treasurer, or secretary of said defendant, B. & O. R. R. Co., I, on the 13th day of July, 1871, made service of the same by delivering a certified copy of this writ to J. R. Law, a clerk of said defendant, at its office or usual place of business in Bellaire, in said county of Belmont, Ohio.

"Sheriff's fees, $2.55.

"WM. H. HAYS, *Sheriff,*
"W. L. BALEN, *Dept.*"

And afterwards, on the 12th day of February, A. D. 1872, came the defendant and filed its certain petition for removal of this cause to the circuit court of the United States for the southern district of Ohio; which said petition for removal is in the words and figures following, to wit:

Petition for Removal.

THE STATE OF OHIO, *Belmont County:*

Court of Common Pleas.

AMOS W. SHEPHERD, Plaintiff,
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY, Defendant.

Petition.

8 The petition of the Baltimore and Ohio Railroad Company, a corporation created by the laws of the State of Maryland, respectfully shows that your petitioner is the defendant in

this suit, and that the same was brought by Amos W. Shepherd, plaintiff, on or about the 3d day of July, 1871, in the court of common pleas of Belmont county, Ohio, in the southern judicial district of Ohio, and that the said plaintiff is, and was at the time of bringing this suit, a citizen of the State of Ohio, and that your petitioner is a corporation created by the laws of the State of Maryland, and was, therefore, at the time this suit was brought and now is a citizen of said State of Maryland, and is to be so regarded for the purposes of this petition.

And your petitioner further respectfully shows that the said plaintiff claims in the sum of six thousand dollars in this suit as damages against your petitioner, and that the matter in dispute therefore exceeds the sum of five hundred dollars, exclusive of costs.

And your petitioner further respectfully represents that this suit is brought by the said plaintiff against said defendant, claiming the said sum of $6,000 damages, which he alleges that he sustained by reason of the erection of the abutments of a bridge across the Ohio river at Bellaire, in said county of Belmont; the said abutments being erected by said defendant in the center of First street, in said town of Bellaire, upon which street the said plaintiff owns a
9 lot of land upon which is erected buildings, which said plaintiff claims have been damaged by the erection of the abutments aforesaid (as will more fully appear by reference to the petition of said plaintiff filed in this case, and which is here referred to and made a part of this petition for removal).

And your petitioner further respectfully represents that this suit has not been tried, but that the same is pending for trial in the court of common pleas of Belmont county, Ohio, and that your petitioner desires to remove this suit, before the trial thereof, into the next circuit court of the United States to be held in the said southern district of the State of Ohio, in pursuance of the provisions of law as contained in the act of Congress approved Sept. 24, 1879, entitled An act for the removal of causes in certain cases from State courts. And your petitioner is ready and willing to give such good and sufficient surety as this court may direct for its doing all acts and things required to be done by the said provisions of law upon the removal of a suit unto the United States court, and it offers herewith its bond, executed by James H. Collins, E. S. Shipley, and Francis Davis, in the penal sum of $1,000, conditioned that your petitioner shall enter in the next circuit court of the United States to be held in the said southern district of the State of Ohio, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in this suit, and doing such
10 other appropriate acts as by the said act of Congress approved Sept. 24th, 1789, are required to be done upon the removal of a suit into the United States court, as good and sufficient sureties, according to the provisions of law upon the removal of a suit into the United States court. And your petitioner therefore prays that the said bond may be accepted as good and sufficient surety, according to the said provisions of law, and that the said suit may be removed into the next circuit court of the United States to be held

in the southern district of Ohio, pursuant to the statute of the United States in such case made and provided, and that no further proceedings may be had therein in this court; and your petitioner will ever pray, &c.

J. H. COLLINS,
Attorney for Defendant.

THE STATE OF OHIO, *Belmont County:*

J. H. Collins, being duly sworn according to law, deposeth and saith that he is the attorney for the defendant (a corporation) in the foregoing suit, and that the facts stated in the foregoing petition are true, as he verily believes.

J. H. COLLINS.

Sworn to and subscribed before me this 12th day of February, 1872.

WM. T. MEEKS, *J. P.*

And on the same day, to wit, February 12th, 1872, came
11 the defendant and filed its certain bond for removal in the words and figures following, to wit:

Bond for Removal.

OHIO, *Belmont County:*

Court of Common Pleas.

AMOS W. SHEPHERD, Plaintiff,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

Bond.

We, James H. Collins, E. V. Shipley, and Francis Dain, of the county of Belmont and State of Ohio, are held and firmly bound unto Amos W. Shepherd, the plaintiff in this suit, in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the said Amos W. Shepherd, his successors or assigns; for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 12th day of February, A. D. 1872.

Whereas a suit was brought, on or about the 3d day of July, 1871, in the court of common pleas of Belmont county, Ohio, by the said Amos W. Shepherd against The Baltimore and Ohio Railroad Company, and the same is now pending for trial in said court, at St. Clairsville, in said county, and is removable to the circuit court of the United States for the southern district of Ohio under an act of Congress approved Sept. 24, 1789, entitled "An act for the removal of causes in certain cases from State courts;" and whereas the said

Baltimore and Ohio Railroad Company has filed its petition
12 in said court of common pleas of Belmont county, Ohio, for the removal of said suit into the next circuit court of the United States to be held in the city of Cincinnati, in said southern district of Ohio:

Now, therefore, the conditions of the above obligation *is* such that — the above-named defendant shall enter or cause to be entered in the circuit court of the United States for the southern district of Ohio, on the first day of its stated session next ensuing after the order of the said court of common pleas of Belmont county, Ohio, for the removal of said suit into said circuit court, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit and do or cause to be done such other appropriate acts as — the said acts of Congress approved Sept. 24, 1789, are required to be done upon the removal of a suit into the United States court, then the above obligation to be void; otherwise to remain in full force and effect.

JAMES H. COLLINS.
FRANCIS DAIN.
E. V. SHIPLEY.

THE STATE OF OHIO, } *ss:*
Belmont County, }

James H. Collins, E. V. Shipley, and Francis Dain, the makers of the above obligation named, being duly sworn, deposeth and saith that they are residents of Belmont county, Ohio, and householders
13 therein, and are each worth more than the sum of one thousand dollars over all just debts and liabilities and claims of property exempt by law from execution.

JAMES H. COLLINS.
FRANCIS DAIN.
E. V. SHIPLEY.

Sworn to and subscribed before me this 12th day of February, A. D. 1872.

WM. T. MEEK, *J. P.*

THE STATE OF OHIO, *Belmont County:*

I certify that on this 12th day of February, A. D. 1872, before me personally appeared James H. Collins, E. V. Shipley, and Francis Dain, to me known to be the persons described in and who executed the foregoing instrument, and severally acknowledged to me that they executed the same as their own free act and deed for the uses and purposes therein mentioned.

WM. T. MEEK, *J. P.*

And afterwards, at the spring term, 1872, of said court, this cause was continued; and afterwards, on the 11th day of June, 1882, at the summer term, 1872, of said court, on motion to the court, leave is given to the defendant, "The Baltimore and Ohio Railroad Company, to amend the petition heretofore filed in this case to remove

the same to the circuit court of the United States by interlining the words and figures "September 24, 1789," instead of July 27th, 1866; and afterwards, at the fall term, 1872, spring term, 1873, summer term, 1873, fall term, 1873, spring term, 1874, and summer
14 term, 1874, of said court, this cause was continued; and afterward, on the 10th day of December, 1874, "at the fall term, 1874, of said court," by agreement of parties, the clerk of this court is ordered to omit from the trial docket this case until further order of this court."

And afterwards, on the 8th day of May, 1877, at the summer term, 1877, of said court, came the defendant, by J. H. Collins, Esq., its attorney, and presented to the court the petition of said defendant for the removal of this cause to the circuit court of the United States for the southern district of Ohio, and also the bond heretofore filed by said defendant, according to the requirements of the laws of the United States relating to the removal of suits from State courts to United States courts; and, upon motion of said attorney for defendant, it is hereby ordered that said security be accepted, and that the said suit be removed into the next circuit court of the United States to be held in said southern district of Ohio, and that no further proceedings be had in said suit in this court.

THE STATE OF OHIO, }
Belmont County, } *ss*:

I, A. C. Darrah, clerk of the court of common pleas within and for the said county, and in whose custody the files, journals, and records of said court are required by the laws of the State of Ohio to be kept, hereby certify *that* the foregoing to be a true and correct copy of all process, pleadings, depositions, and the proceedings of said
15 court in said suit of Amos W. Shepherd against The Baltimore and Ohio Railroad Company.

Witness my signature and seal of said court, at the court-house, in St. Clairsville, in said county, this 29th day of January, A. D. 1880.

[L. S.] A. C. DARRAH, *Clerk*,
By A. THOMPSON, *Dep. Clerk.*

And afterward, to wit, on the said the 14th day of February, in the year last aforesaid, came the defendant herein aforesaid, by its said attorneys aforesaid, and filed in the clerk's office of the court aforesaid in this cause its certain answer to the said petition of said plaintiff so as aforesaid heretofore filed in this cause in the said the court of common pleas of Belmont county, Ohio, and in the foregoing transcript above set forth; and which said answer so as aforesaid filed is clothed in the words and figures as follows, to wit:

Answer.

In the Circuit Court of the United States for the Southern District of Ohio.

AMOS W. SHEPHERD, Plaintiff,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, Defendant.

First defense. The defendant comes and, for answer to the petition of said plaintiff, denies that said plaintiff is the owner of the
16 real estate described in said petition; denies that the defendant wrongfully and unjustly intended to injure said plaintiff by entering upon said First street and making said excavations and erecting said abutments, and the defendant denies that it thereby intended to deprive the plaintiff of the use and unobstructed and uninterrupted passage into and upon said property so described.

The defendant denies that it wrongfully or unjustly entered upon said street, and it denies that it so entered without the "*liens*" and consent of said plaintiff, and it denies that it made said excavations & erected said abutments without the consent of said plaintiff, and it denies that the passage to & from said property is unreasonably obstructed thereby, and it denies that said plaintiff has been injured thereby as alleged in said petition.

Second defense. And the defendant, for a second defense, says that at the time named in said petition it was in possession of the Central Ohio railroad as the lessee of the Central Ohio Railroad Company, which company was created a corporation by the act of the General Assembly of the State of Ohio, entitled "An act to incorporate the Central Ohio Railroad Company," passed February 8th, 1847, which act is here referred to and made a part hereof; that under the authority of the said act the defendant and its said lessor, in the year 1867, entered into a written contract with
17 said village of Bellaire, Ohio, by the terms of which said defendant and its said lessor were granted the authority to enter upon said First street and erect said abutments and make said excavations as described in said petition, and they did so enter and make said excavations and erect said abutments under and in pursuance of the authority so granted; and the defendant says that said contract & authority were so made and granted by said village on the special request and at the instance of said plaintiff & other citizens thereof; that said plaintiff made no objection to the making of said excavations & the erection of said abutments until the same were completed and until this suit was brought, although he had full knowledge that said defendant and its lessor were erecting the same and were claiming the right so to do.

HOADLY, JOHNSON & COLSTON AND
J. H. COLLINS, *Att'y- for Def't.*

THE STATE OF OHIO, *Belmont County:*

J. H. Collins, being duly sworn, says that he is one of the attorneys in the foregoing action for the defendant (a corporation), and that he believes the facts stated in this answer are true.

(Signed) J. H. COLLINS.

Sworn to before me & subscribed in my presence by J. H. Collins this 11th day of December, 1879.

[L. S.] (Signed) B. MACKALL,
Notary Public.

18 And afterward, to wit, on the 8th day of February, A. D. 1881, an entry was made upon the journal of the court aforesaid; and which said entry upon which said journal so as aforesaid made is clothed in the words and figures as follows, to wit:

Journal Entry W, 10.

AMOS W. SHEPHERD
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY. } 2546.

Money.

Continued by consent.

By consent of parties it is ordered that the above case be, and the same is hereby, continued.

And afterward, to wit, on the 7 day of May, in the year last aforesaid, an entry was made upon the journal of the court aforesaid; and which said entry so made herein is clothed in the words and figures as follows, to wit:

Journal Entry W, 99.

AMOS W. SHEPHERD
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY. } 2546.

Money.

On motion to the court, it is ordered that the default herein be, and the same is hereby, set aside, and leave is granted plaintiff to file his reply herein forthwith, and the same is accordingly filed.

19 And afterward, to wit, on the day and year last aforesaid, the said plaintiff came, by his said attorneys, and filed his said reply herein; and which said reply so as aforesaid filed is clothed in the words and figures as follows, to wit:

Reply.

United States Circuit Court, Southern District of Ohio.

AMOS W. SHEPHERD, Plaintiff,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, Defendant.

Amos W. Shepherd, plaintiff, for reply to the second defense in the answer of the defendant filed in this court, protesting that the same is not sufficient in law to constitute a defense to the petition, denies that a contract, such as alleged, was entered into by the defendant and its lessor with the incorporated village of Bellaire city. He denies that such contract was made at his instance and request. He denies that the obstructions complained of or any part of them were commenced or approaching completion without objection on his part.

J. B. SMITH & D. D. T. COWEN,
P'l'ff's Att'ys of Record.

OHIO, *Belmont County:*

Amos W. Shepherd, being sworn, says that the statements contained in the foregoing reply he believes to be true.

(Signed) A. W. SHEPHERD.

Sworn to before me and subscribed in my presence by Amos W. Shepherd May 4th, 1881.

[L. S.] P. G. COWEN,
Notary Public.

20 And afterwards, to wit, on the 7th day of February, A. D. 1882, an entry was made upon the journal of the court aforesaid in this cause; and which said entry so as aforesaid made is clothed in the words and figures as follows, to wit:

Journal Entry U, 272.

AMOS W. SHEPHERD
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY. } 2546.

Money.

Continued.

On motion to the court and for good cause shown, it is ordered that this case be, and the same is hereby, continued at defendant's costs.

And afterward, to wit, on the 6th day of March, A. D. 1883, an entry was made upon the journal of the court aforesaid in this cause; and which said entry so as aforesaid made is clothed in the words and figures as follows, to wit:

Journal Entry V, 32.

AMOS W. SHEPHERD
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY. } 2546.

Money.

Continued by consent.

And afterward, to wit, on the 27th day of April, in the year last aforesaid, came the defendant herein aforesaid, by its said attorneys, and filed in the clerk's office of the court aforesaid in this
21 cause its certain motion to require the said plaintiff herein to give additional security for costs of this cause; and which said motion so as aforesaid filed is clothed in the words and figures as follows, to wit:

Motion.

Circuit Court U. S., South'n Dist. of Ohio, W. D.

AMOS W. SHEPHERD
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY.

And now comes the defendant, by its attorneys, and move the court to require the above plaintiff to give additional security for costs in this cause.

J. A. COLLINS &
HOADLY, JOHNSON & COLSTON,
Att'ys for Def't.

And afterward, to wit, on the 1st day of May, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause; and which said entry upon *which* said journal so as aforesaid made is clothed in the words and figures as follows, to wit:

Journal Entry V, 89.

AMOS W. SHEPHERD
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY. } 2546.

Money.

Motion sustained.

The above cause came on for hearing on the motion of the defendant to require the plaintiff in said cause to give ad-
22 ditional security for costs, and was argued by counsel; and the court, being fully advised in the premises, sustains said motion. It is therefore ordered that the plaintiff in said cause give additional security for costs on or before the first day of the next term of this court.

And afterward, to wit, on the 1st day of October, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause; and which said entry so as aforesaid made is clothed in the words and figures as follows, to wit:

Journal Entry V, 145.

AMOS W. SHEPHERD
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY. } 2546.

Money.

Continued by consent.

And afterward, to wit, on the 9th day of April, A. D. 1885, came the plaintiff aforesaid herein, by his attorneys aforesaid, and filed in the clerk's office of the court aforesaid in this cause his certain stipulation for costs; and which said stipulation for costs so as aforesaid filed is clothed in the words and figures as follows, to wit:

Stipulation for Costs.

AMOS W. SHEPHERD, Plaintiff,
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY, Defendant.

23 Case pending in the circuit court of the United States in and for the southern district of the State of Ohio, at Cincinnati.

We, the undersigned, John B. Haney and J. B. Smith, do hereby acknowledge ourselves security for costs in the above case in said court.

Signed by us this 6th day of April, A. D. 1885.

(Signed) J. B. HANEY.
(Signed) J. B. SMITH.

And afterward, to wit, but on the day and year last aforesaid, came the said plaintiff herein aforesaid, by his said attorneys, and filed in the said the clerk's office of the court aforesaid in this cause his certain bond for costs herein; and which said bond for costs so as aforesaid filed is clothed in the words and figures as follows, to wit:

Cost Bond.

In the Circuit Court of the United States for the Southern District of Ohio.

AMOS W. SHEPHERD
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY. } No. 2546.

I hereby acknowledge myself security for costs in this case.

(Signed) J. B. SMITH. [SEAL.]

24 Taken and acknowledged before me this 8th day of April, 1885.

____ ____,
Clerk U. S. — Court, S. D. O.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, J. B. Smith, a resident of said district, do solemnly swear that after paying my just debts and liabilities I am worth two thousand dollars in real estate within the jurisdiction of this court and subject to execution, levy, and sale.

(Signed) J. B. SMITH.

Sworn to and subscribed before me this 8th day of April, A. D. 1885.

[L. S.] (Signed) JOHN A. GALLAHER,
Notary Public in and for Belmont County, State of Ohio.

And afterward, to wit, on the 14th day of April, in the year last aforesaid, came the said plaintiff herein aforesaid, by his said attorneys aforesaid, and filed in the clerk's office of the court aforesaid in this cause his certain other cost bond herein; and which said cost bond so as aforesaid filed is clothed in the words and figures as follows, to wit:

Cost Bond.

In the — Court of the United States for the Southern District of Ohio.

AMOS W. SHEPHERD
vs.
25 THE BALTIMORE & OHIO RAILROAD COMPANY. } No. —.

I hereby acknowledge myself security for costs in this case.

(Signed) WILLIAM M. DRUGAN. [SEAL.]

Taken and acknowledged before me this — day of ——.

____ ____,
Clerk U. S. — Court, S. D. O.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, William M. Drugan, a resident of said district, do solemnly swear that after paying my just debts and liabilities I am worth two thousand dollars in real estate within the jurisdiction of this court and subject to execution, levy, and sale.

(Signed) WILLIAM M. DRUGAN.

Sworn to and subscribed before me this 13th day of April, A. D. 1885.

[L. S.] (Signed) JOHN A. GALLAHER,
Notary Public.

And afterward, to wit, on the 3d day of November, in the year last aforesaid, a journal entry was made upon the journal of the court aforesaid in this cause; and which said entry so as aforesaid made is clothed in the words and figures as follows, to wit:

Journal Entry W, 222.

AMOS W. SHEPHERD
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY. } No. 2546.

Money.

This day came the parties, by their attorneys; and thereupon, to try the issues joined between the parties, a jury, being called, came, to wit, Eugene Dunning, J. H. Richter, James M. Jackson, M. P. Alston, William Ammens, Daniel F. Davis, John Walter, John D. Minor, William F. Irwin, J. H. Kyle, W. A. Vincent, and C. D. Resor, who were duly empaneled and sworn well and truly to try the issues joined between the parties; but, the testimony not being finished, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

And afterward, to wit, on the 4th day of November, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause; and which said entry so as aforesaid made is clothed in the words and figures as follows, to wit:

Journal Entry W, 224.

AMOS W. SHEPHERD
vs.
THE BALTIMORE & OHIO RAILROAD CO. } 2546.

Money.

This day again came the parties, by their attorneys; also the jurors heretofore empaneled and sworn herein, who, having heard the evidence and the charge of the court, do find the issues joined to be in favor of the defendant.

27 Whereupon the plaintiff, by his attorney, gave notice of a motion for a new trial.

And afterward, to wit, on the 7th day of November, in the year last aforesaid, came the said plaintiff herein aforesaid, by his attorneys aforesaid, and filed in the said the clerk's office of the court aforesaid in this cause his certain motion for a new trial; and which said motion for a new trial of this cause so as aforesaid filed is clothed in the words and figures as follows, to wit:

Motion for a New Trial.

U. S. Circuit Court.

A. W. SHEPHERD

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY.

Plaintiff move- to set aside the verdict and for a new trial because—

1. The court erred in sustaining objections to testimony & in excluding testimony.
2. The court erred in its charge to the jury.
3. The verdict is against the law & evidence.

Nov. 7, '85.

JOHN W. HERRON & J. B. SMITH, *Att'ys.*

And afterward, to wit, on the 28th day of December, in the year last aforesaid, a journal entry was made herein in the words and figures as follows, to wit:

Journal Entry W, 276.

AMOS W. SHEPHERD

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

Money.

28 This cause came on for hearing upon plaintiff's motion for a new trial, and was argued by counsel; on consideration whereof the court, being fully advised in the premises, overrules said motion. It is therefore ordered that the defendant have and recover of plaintiff its costs herein expended, and execution is awarded therefor; to which action of the court the plaintiff, by his counsel, excepts.

Whereupon the plaintiff presented his certain bill of exceptions and prayed that the same be allowed, signed, sealed, and made a part of the record in this cause, which is accordingly done.

And afterward, to wit, on the day and year last aforesaid, came the plaintiff aforesaid, by his said attorneys, and filed in the clerk's office of the court aforesaid in this cause his said bill of exceptions; and which said bill of exceptions so as aforesaid filed is clothed in the words and figures as follows, to wit:

Bill of Exceptions.

Circuit Court of the United States, Southern District of Ohio, Western Division.

AMOS W. SHEPHERD, Plaintiff,
against
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant. } No. 2546.

29 Be it remembered that at the October term of said court for the year eighteen hundred and eighty-five, before the Honorable George R. Sage, United States district judge for the southern district of Ohio, sitting as circuit judge, the above cause came on to be tried, and a jury was empannelled and sworn.

And thereupon the plaintiff, to sustain the issues in said cause on his part, called as a witness James B. Darragh, who, being first sworn according to law, testified that he resided in Bellaire, Ohio, and by occupation was a builder and contractor; that he was well acquainted with the market value of real estate in Bellaire, and was so in 1868; that he was acquainted with the property of plaintiff in Bellaire about which this suit is brought, and has been in the habit of passing it daily, & knew it well and its market value in 1868, 1869, and 1870. Said property is situated on the west side of Union street, beginning 33 feet south from First street, as it was named when the petition herein was filed, but now named Thirty-first street. Said property is thirty-three feet in front by about one hundred and twenty feet deep to an alley. This alley extends from Thirty-first street to Crescent street, which is parallel to and the street next south from Thirty-first street. The defendant's railroad track was built on arches in Thirty-first street, said arches
30 springing from stone pillars about twenty-seven feet apart, and each of the length of twelve feet, thickness of six feet, and height of thirty feet; that there — two of said stone pillars in Water street and five in Thirty-first street. Two of said pillars are at the intersection of Thirty-first and Union streets, and each of them extended fifteen inches within the line of the sidewalk, being one on each side of the roadway of Union street, extended through Thirty-first. The railroad through Thirty-first street was about three years—from three to four years—in building. During this time Union street for about one hundred feet south from Thirty-first street towards Crescent street was obstructed by stone, timber, rocks, derricks, steam-engines, barrels, guy ropes, &c., these obstructions extending past and in front of plaintiff's said property, on which was a two-story brick building; the first floor front was used as a dry-goods store, and the rest of the building as a hotel. A great part of the time while the railroad was being built teams could not get to the plaintiff's said property because of said obstructions, and at times one could hardly get to it or by it on foot. Before the railroad was built as aforesaid the plaintiff's said property was worth from $9,000 to $10,000. After it was built it was not

worth more than from $4,000 to $5,000. Before the railroad was built said store-room would have rented for from $400 to
31 $500 per annum, and the whole building for $1,000; afterwards for not more than half that sum.

The foregoing testimony having been admitted subject to the defendant's objection and exception, the court thereupon, on the defendant's motion, excluded from the consideration of the jury so much thereof as related to the depreciation of the value thereof by reason of the obstructions testified to, and also all testimony relating to the diminution of the rental value of said property.

Thereupon the plaintiff, by his counsel, offered to prove by the witness on the stand and by other witnesses in attendance, and by depositions of witnesses taken in this case, that the building of defendant railroad in Thirty-first street as aforesaid was in progress three or four years; that during said time the defendant obstructed Union street in front of plaintiff's property with materials of all kinds used in building said railroad, so that access to said property was seriously obstructed; that by reason of said obstruction plaintiff's tenants occupying said premises left them, and plaintiff was unable to rent said premises, and by reason thereof plaintiff lost the rental value of said premises, amounting to at least two thousand dollars, & that access from Thirty-first street to the alley in the rear of plaintiff's property was entirely cut off during the building of said railroad as aforesaid, and that said alley was too nar-
32 row for teams coming in from the other direction to turn, and that plaintiff had a stable at the rear of his said property and abutting on said alley which became and was entirely untenantable during said bui-ding of said railroad; that the building of said pillars and the archway connecting the same at the intersection of Union and Thirty-first streets damaged the access to plaintiff's said property from Union street, and the building of the railroad as aforesaid in Thirty-first street west of Union street damaged plaintiff's access to his said property through the alley aforesaid in the rear and depreciated the market value in the sum claimed in the petition.

And thereupon, after full argument, the court decided not to admit said testimony nor any part thereof, and ruled that damages to the rental value of the plaintiff's said property were not recoverable in this action, nor damages resulting from the placing of obstructions in Union street in front of plaintiff's said property during the time of the building of said railroad as aforesaid, and that no recovery could be had by plaintiff for damages to his said property by reason of the building of said railroad as aforesaid in Thirty-first street.

And the court further decided that section 3283, Revised Statutes of Ohio (original enactment, volume 54, page 133, § 12, Ohio Laws), does not enlarge or extend the liabilities of railroad companies,
33 but only preserves the right of property-owners to recover for injuries done to their property by the building of railroads under agreements made with municipal or other corporations, or public officers or authorities, as provided in said action, precisely

as if no such agreements had been made. To each and all of the said decisions and rulings the plaintiff at the time excepted, and, having no other or further testimony to offer, rested his case.

Whereupon the defendant moved the court to direct the jury to return a verdict for the defendant, and the court granted said motion and directed the jury accordingly; to all which the plaintiff at the time excepted.

And the jury thereupon, in accordance with the direction of the court, returned their verdict for the defendant. And thereupon the plaintiff gave notice of motion for new trial, and filed his motion in writing for new trial on the grounds that the court erred in excluding and in refusing to admit the evidence aforesaid and in the said ruling and decisions as well as in the said direction to the jury to return a verdict for the defendant.

And the court overruled said motion and rendered judgment herein for the defendant; to all of which the plaintiff at the time excepted and tendered this his bill of exceptions, and prayed that the same might be signed, sealed, allowed, and made part of
34 the record of this cause, which is accordingly done.

[SEAL.] (Signed) GEORGE R. SAGE,
United States District Judge, Southern District of Ohio,
Sitting as Circuit Judge in Above-Entitled Cause.

And afterward, to wit, on the 9th day of January, in the year last aforesaid, there was issued out of the clerk's office of the court aforesaid in this cause our certain writ of error; and which said writ of error so as aforesaid issued is clothed in the words and figures as follows, hereto annexed, to wit:

35 *Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Amos W. Shepherd and the Baltimore and Ohio Railroad Co., a manifest error hath happened, to the great damage of the said Amos W. Shepherd, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of

right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the ninth day of January, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal of the Circuit Court South'n Dist. of Ohio.]

B. R. COWEN,
Clerk of the Circuit Court of the U. S., S. D. O.

[Endorsed:] United States circuit court, southern dist. of Ohio. No. 2546. Amos W. Shepherd *vs.* The B. & O. R. R. Co. Writ of error. Filed Jan'y 9th, 1886. B. R. Cowen, clerk.

36 And afterward, to wit, on the day and year last aforesaid, there was issued out of the said clerk's office of the court aforesaid in this cause our certain citation, directed to said defendant in error; and which said citation so as aforesaid issued and directed, with the said defendant's waiver of service of the same thereon endorsed, is hereto annexed, as follows, to wit:

37 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

To The Baltimore and Ohio Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein Amos W. Shepherd — plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this ninth day of January, in the year of our Lord one thousand eight hundred and eighty-six.

GEORGE R. SAGE,
District Judge, S. D. O., Sitting and Holding the Circuit Court for said District, no Circuit Judge or Circuit Justice Being Present.

37½ [Endorsed:] United States circuit court, southern dist. of Ohio. No. 2546. Amos W. Shepherd *vs.* The B. & O. R. R. Co. Citation to defendant in error. Filed Jan'y 18, 1886. B. R. Cowen, clerk.

Service of this citation waived.
Jan'y 18, 1886.

HOADLY, JOHNSON & COLSTON,
Attorneys for B. & O. R. R. Co., Defendants in Error.

38 UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division:

I, B. R. Cowen, clerk of the circuit court of the United States within and for the district aforesaid, do hereby certify the foregoing to be a true and complete transcript of the record and proceedings of the court aforesaid in the cause therein named as the same remains of record and on file in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court aforesaid this 19th day of January, A. D. 1886, and in the one hundred and tenth year of the Independence of the United States of America.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN,
Clerk U. S. Circuit Court, S. D. O.
By ROB'T C. GEORGI, *Deputy.*

39 *Petition in Error.*

In the Supreme Court of the United States.

AMOS W. SHEPPARD
ag't
THE BALTIMORE AND OHIO RAILROAD COMPANY.

Plaintiff states that at the October term, A. D. 1885, of the circuit court of the United States for the southern district of Ohio, in an action pending in said court, wherein this plaintiff was plaintiff and the above-named defendant was defendant, a judgment was rendered against this plaintiff, as will more fully appear by reference to the transcript of the record of said cause, which is filed herewith.

And plaintiff further says that in the record of said cause there is manifest error, in this:

1. The said court erred in excluding testimony offered or proposed to be offered by the plaintiff.

2. The said court erred in its charge to the jury.

Plaintiff therefore asks that the said judgment be reversed and this cause remanded to the said circuit court for a new trial.

JOHN W. HERRON,
Att'y for Pl'ff in Error.

[Endorsed:] Supreme court of Ohio. Amos W. Shepherd *vs.* The Baltimore & Ohio Railroad Company. Petition in error. John W. Herron, att'y for pl'ff in error.

Endorsed on cover: S. Ohio C. C. U. S. No. 213. Amos W. Shepherd, plaintiff in error, *vs.* The Baltimore and Ohio Railroad Company. Filed January 22, 1886.

Supreme Court of United States,

OF THE OCTOBER TERM, 1888.

AMOS W. SHEPHERD,

PLAINTIFF IN ERROR,

VS.

THE BALTIMORE & OHIO RAILROAD CO.,

DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN W. HERRON, of Counsel for Plaintiff in Error.

Keating & Co., 130 Walnut.

Supreme Court of United States,

OF THE OCTOBER TERM, 1888.

AMOS W. SHEPHERD,

PLAINTIFF IN ERROR,

vs.

THE BALTIMORE & OHIO RAILROAD CO.,

DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

This cause comes into this Court by a petition in error from the Circuit Court of the United States for the Southern District of Ohio.

On July 3, 1871, the plaintiff brought an action in the Court of Common Pleas of Belmont County, Ohio, against the defendant to recover $6000 damages for injuries to his property in Bellaire, Ohio. The petition alleged that the plaintiff was the owner of a brick house arranged and used for a hotel and store room, fronting on Water street, in said city, and lying 33 feet from First (or 31st) street; that it was bounded on the east by Water street and on the west by an alley running from First street to Crescent street: that Water street, First street and the alley were dedicated highways, and that he was entitled to the unobstructed use of them for access to his property; that the defendant, without his authority and contrary to his will, about

Supreme Court of United States,

OF THE OCTOBER TERM, 1888.

AMOS W. SHEPHERD,

PLAINTIFF IN ERROR,

vs.

THE BALTIMORE & OHIO RAILROAD CO.,

DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

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the 1st of April, 1868, and since that time, entered upon Water and First streets and made large excavations therein and in the immediate vicinity of his property; constructed large stone pillars in said streets and across said alley and are erecting a railroad upon said pillars. It describes the pillars, and alleges that the defendant encumbered and obstructed said streets and alley in the construction of said stone pillars in the streets during this time so as to deprive plaintiff of a free, safe and unobstructed access to his property. The whole petition appears on pages 2 and 3 of the printed record.

This cause was removed by the defendant by petition to the Circuit Court of the United States for the Southern District of Ohio, and after the removal an answer was filed in that Court.

This answer denies the ownership of the plaintiff in the property claimed to be injured: it denies that the defendant wrongfully and unjustly intended to injure the plaintiff by entering on First street and making said excavations and building the said abutments, or that it thereby intended to deprive plaintiff of the access to his property: it denies that it wrongfully or unjustly entered on said street; or that it made said excavations and erected said abutments without the consent of plaintiff; or that the passage to and from plaintiff's property is unreasonably obstructed thereby or that plaintiff has been damaged as alleged.

For a second defense the answer alleges that at the time named in the petition it was in possession of the Central Ohio Railroad as lessese of the Central Ohio Railroad Company, which company was chartered by the Legislature of the State of Ohio by act passed February 8, 1874 "which act is here refered to and made part hereof:"; that under the authority of said act the defendant and its lessor entered into a written contract with said

village of Bellaire, by the terms of which said defendant and its lessor were granted the authority to enter on said First street and to make said excavations and to build said abutments, and that it did so enter by virtue of said authority; that said contract was made on the special request and authority of said plaintiff and other citizens of Bellaire, and that plaintiff made no objections to the making of said excavations or building said abutments until they were completed, although he had full notice of them.

This answer appears on page 9, of the printed record,

The plaintiff in his reply (see page 11) denies that a contract such as alleged, was entered into with the village of Bellaire; or that such contract was made at his instance or request, or that the obstructions complained of or any part of them were commenced or approaching completion without objection on his part, and protests that the second defense does not in law constitute a defense to the petition.

The case was tried at the November term 1885 of the Circuit Court. The plaintiff proved that his property fronted on Union (formerly Water) street, beginning 33 feet south of First or Thirty-first street: that it was 33 feet front by one hundred and twenty feet deep to an alley extending from Thirty-first street to Crescent street, which is parallel to and next south of Thirty-first street: that there was a two-story brick building erected on this lot, the first story being used as a dry goods store and the rest as a hotel, and that there was on it a stable fronting on the alley. The railroad was built on arches, springing from stone pillars which were 30 feet high, 12 feet long and 6 feet thick. Two of these pillars were built in the intersection of Union and Thirty-first streets—one on each side of the roadway in Union street and extending within the sidewalk on

each side about 15 inches. That the railroad was about three years in building, during which time Union street in front of plaintiff's property was filled with obstructions, rendering access to his property difficult, and that access to the stable through the alley was also cut off: that plaintiff's tenants left; that the stable was wholly untenantable, and the use of the rest of the property greatly damaged: that the rental and market value of the property was reduced one-half by the building of the railroad and his access to his property greatly injured.

Objection was made to this testimony and the Court excluded it and ruled;

"Not to admit said testimony or any part thereof, and ruled that damages to the rental value of plaintiff's said property were not recoverable in this action, nor damages resulting from the placing of obstructions in Union street in front of plaintiff's said property during the time of the building of said railroad as aforesaid, and that no recovery could be had by plaintiff for damages to his said property by reason of the building of said railroad as aforesaid in Thirty-first street."

"And the Court further decided that section 3283 Revised Statutes of Ohio (original enactment volume 54, page 133, sec. 12, Ohio Laws), does not enlarge or extend the liability of railroad companies, but only preserves the right of property owners to recover for injuries done to their property by the building of railroads under agreements made with municipal or other corporations, or public officers or authorities, as provided in said section, precisely as if no such agreements had been made."

The Court further instructed the jury to return a verdict for defendant.

Exceptions were taken to these several rulings of the Court: a motion for a new trial made and over-ruled and a bill of

exceptions taken and signed by the Judge, as appears on page 17 of the printed record.

The statute of the State of Ohio referred to in the charge of the Court, and on which we rely in part as the foundation of our cause of action, appears in section 3283 of the Revised Statutes of Ohio. The original act will be found in volume 54, page 133 of the Ohio Laws, and was passed April 15th, 1857. This act was in force during all the time covered by the controversy in this case.

It reads as follows—

"If it shall be necessary in the location of any part of any railroad, to occupy any road, street, alley, or public way, or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation, or public officer, or public authority, owning or having in charge thereof, and the railroad company to agree upon the manner, and upon the terms and conditions upon which the same may be used or occupied; and if said parties shall be unable to agree thereon, and it shall be necessary in the judgment of the directors of such railroad company to use or occupy such road, street, alley, or public way or ground, such company may appropriate so much of the same as may be necessary for the purpose of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals by the tenth section of this act;

"Provided, that every railroad company laying down any such track or tracks, upon any public street, road, alley, or other public ground, shall be responsible for injuries done to private property by such location, lying upon or near to such public ground, which may be recovered by civil action brought by the

owner or owners, at any time within two years from the completion of such track or tracks, before the proper Court."

1.

It has been claimed by counsel for the defendant in error that the present action is not brought upon this statute and that therefore the damages provided by the statute cannot be recovered in this suit.

The statute simply provides that a railroad company doing certain things shall be liable to a civil action. The petition alleges that the defendant has done the acts which by that statute rendered it liable. It laid down its tracks upon a public street. Its answer admits this and alleges that it did so under a contract made with the municipal authorities of Bellaire. This suit is a civil action to recover the damages sustained by those acts. It was not necessary to plead the statute. It was simply necessary to allege the acts giving a cause of action to the plaintiff and the damages sustained by him by reason of those acts. The code of Ohio recommends simple and brief pleadings.

But it has been held by the Supreme Court of Ohio, that all actions to recover damages to adjoining property, against railroads in taking possession of the streets under authority of the municipal corporations are governed by this statute.

In *Railroad Co.* v. *Mowatt*, 35 Ohio St., 284, it was attempted by the plaintiff to evade the limitation of actions fixed in the statute of 1857 by ignoring the statute and claiming that the defendant was liable at Common law. On page 287 the Court held that this statute applied, although it was not pleaded.

It makes no difference as to the form of the pleading if there is a liability for damages and the action is brought to recover such damages.

A case exactly like the present was before one member of this Court, and was decided by him and reported in the 21 *Fed. Rep.* 309, *Grafton* v. *B. & O. R. R. Co.* That was one of a series of cases of which the present is another. The petition was in precisely the same form as the present, and the case was argued in the same manner as now. It was claimed that it was not a suit under the statute, but Justice Matthews, while he does not expressly decide that it was under the statute, treats it throughout as governed by that act and held that the plaintiff in that case could recover all damages authorized by that act. That decision could be sustained only on the ground that a petition like the present authorized the recovery of such damages. It is not necessary to say that this action is brought under that statute, but only that the laws of Ohio authorize any party injured to recover from a railroad by civil action any damages which he may sustain by reason of such railroad laying a track in a street adjoining or near to his property.

2.

I claim further that the Court erred in holding that the plaintiff in this action could not recover "damages resulting from the placing of obstructions in Union street in front of plaintiff's said property during the time of the building of said railroad as aforesaid."

The testimony showed that for three years, while such construction was going on, the street in front of plaintiff's property was obstructed by stone, timber, rocks, derricks, steam engines, barrels, guy-ropes, etc.; that teams could not get to plaintiff's property because of said obstructions, and at times one could hardly get to it or by it on foot; that his tenants left and he was unable to rent his property; that it was impossible to get into the alley

in the rear or to the stable on plaintiff's premises, and that it remained empty. All this was occasioned by the act of the defendant in taking possession of the street in front of plaintiff's property.

He undoubtedly had a property interest in that part of the street, and he was for the time deprived of that interest, and if he suffered any damage whatever by reason of that act he was entitled to the verdict of the jury.

The petition alleges that the defendant entered upon Water or Union street and that it was obstructing said streets and alley in the construction of said stone pillars during all the time aforesaid. This petition is broad enough to cover the obstruction of Union street and the alley during the course of the construction of the pillars. It was a part of the construction complained of, and in doing that work the defendant took possession of the side street and alley and damaged plaintiff's property. It may be that there are two distinct causes of action in the petition, but this objection could not under the code of Ohio be raised by demurrer nor by objection on the trial. It could only be raised by motion to require the plaintiff to separately state and number his causes of action, or to make his petition more definite and certain.

There is a cause of action stated in the petition growing out of the obstruction of the street and alley in front of plaintiff's property during the construction of the work complained of. That obstruction, under the decisions in Ohio, rendered the defendant, liable to whatever damages the plaintiff thereby sustained. He was entitled to have the question and amount of his damages passed upon by the jury.

In *Hambleton* v. *Railroad*, 40 Ohio St. 501, the Court says:

"The interest of an adjacent land-owner in a street is so well defined in this State that nothing need be said about it further

than to refer to the cases in which it has been defined"; and refers to

Bingham v. *Doane*, 9 Ohio 168;
Crawford v. *Village of Delaware*, 7 Ohio St. 459;
Railway v. *Cumminsville*, 14 Ohio St. 523;
Railway v. *Lawrence*, 38 Ohio St. 41.

3.

The main question, however, in the present case is whether the fact that plaintiff's property did not front on the street in which the railroad was laid prevents a recovery. The Court below held that it did.

This ruling undertakes to ignore wholly a part of the statute. The language of the statute is that the railroad "shall be responsible for injuries done to private property lying upon or *near* to such public ground," etc. The plaintiff's property lies within 33 feet of Thirty-first street, in which the track is laid. Two large pillars are built at the intersection of Union and Thirty-first street, and the access to the alley is also obstructed. His property is certainly "near" to the street. It is clearly within the language of the statute. By what right did the Court therefore refuse to the plaintiff the benefit of the statute? Undoubtedly the distance of 33 feet from the street would affect the amount of damages. The greater the distance of the property from the railroad track the less the damages sustained would ordinarily be. If the statute in such case provided that the plaintiff might recover his damages if he sustained any, can the Court find as a legal conclusion that he could sustain no damage whatever? Does not the length of a street, its width, its general character, give a value to property upon it? Would not the blocking up entirely of a street near to property affect its value? Would not the narrowing of

a street to a mere alley through its entire length except in front of a specific piece of property affect the value of that street to that property? Are there not many ways by which property would be damaged by obstructions or changes in a street not immediately in front of such property? Would not the same damages as the Supreme Court of Ohio held in *Railroad* v. *Gardner*, cited hereafter could be recovered under this statute—affect property lying 33 feet from the track in the same manner as if abutting on it?

It may be that without a statute such damages could not be recovered by law. But the law-making power has the right to give to such property a right to recover such damages. If the rights of the owners of property on a street are established by the law-making power, then whoever violates those rights without a higher right so to do is liable for the damages sustained.

The law-making power of Ohio has established these rights. It has settled the doctrine beyond a cavil that owners of property on a street have property rights in that street which the courts will recognize, and damages to which may be recovered. It has prescribed the modes by which railroads may obtain the use of streets and at the same time fixes their liabilities in doing so—to be responsible for injuries to private property lying upon or *near* such street.

The Courts of Ohio have fully recognized the fact that this act applies to property not abutting on the street.

In *Railroad* v. *Mowatt*, 35 Ohio St. 284.

The premises did not abut on the street in which the track was laid but were near thereto. *Held*, that the case is governed by section 12 of the general act of 1852 relating to corporations as amended in 1857 (54 Ohio L. 133).

On page 287 the Court says:

"The premises are near to that street; and it is difficult to see why the case is not within the statutory provision."

This statute was again under consideration in *Railway* v. *Gardner*, 45 Ohio St. 309, decided in 1887.

Chief-Justice Owen, on page 318, says:

"The act in question expressly authorizes an action and recovery for injuries done by laying a track upon any such street or ground, to private or public property "lying upon or *near to* the street or ground upon which the track is laid." It seems that to entitle a property owner to recover for an injury to his property, it need not necessarily be situated *upon* the street occupied by the track. The statute reaches beyond the decision in prescribing a remedy for a party whose property is injured by the location and operation of a railroad track through the street of a municipal corporation."

And again:

"True in the case at bar, the property involved was situated upon the street occupied by the track. It cannot be claimed however that the remedy of the owners is restricted by that fact."

This case goes further and states what kind of damages are properly recoverable under this statute and which are as damaging to the plaintiff's property as they could be if it actually fronted on the street.

These decisions clearly give the construction of this statute which I claim and wholly adverse to the rulings of the Court below.

But it does not follow that without a statute a party who does not abut on the street cannot in any case recover damages against a railroad company using that street.

In *Rude* v. *City of St. Louis*, 93. Mo., on page 415 the court said:

"Generally these damages have been awarded to a property owner for an obstruction in the street upon which the property fronted: Yet it cannot be said that that is always essential to a recovery. The property may not be on the street yet communicate with it by means of a private way, in which event it would seem that an obstruction at the private way would be an infringement of a private right."

4.

Again. The Court in charging the jury held that section 3287 of the Revised Statutes "does not enlarge or extend the liability of railroad companies but only preserves the right of property owners to recover for injuries done to their property by the building of railroads under agreements made with municipal or other corporations or public officers or authorities, as provided in said section precisely as if no such agreement had been made."

This is neither in accordance with the plain words of the statute nor according to the construction of it given by the Supreme Court of our State.

The language is that the railroad company shall be responsible for injuries done to private property lying upon or near to such public ground, to be recovered by civil action. It does not say that it shall be liable for the same injuries as it would have been had such agreement not been made, but it enlarges the extent of its liability both as to the class of property and the character of the injuries.

In *Railway Company* v. *Gardner* before cited C.-J. Owen, referring to the Parrott case in 10 Ohio St., 624, in which the character of injuries for which an abutting property owner could recover, says, on page 318:

"The provision in force at the time of the injury complained

of in that case, of which section 3283 is an amendment, created no such remedy for land owners as we are considering."

And "the statute reaches beyond the decision in prescribing a remedy for a party whose property is injured by the location of a railroad track through the street of a municipal corporation."

And in this case the plaintiff was permitted by virtue of this act to recover damages for a class of injuries to his property that in the Parrot case had been held to be injuries common to the public at large, and not recoverable in an action by the abutting property owner.

All the decisions in Ohio upon this statute recognize it as imposing additional liabilities to those which previously existed.

It seems to me, therefore, clear that under the statutes of Ohio the plaintiff had a right to recover whatever damages he sustained. The amount or character of these damages is not before this Court—all evidence on that subject was excluded. Be they ever so small, he was entitled to a verdict of the jury upon them. As said by Judge Cowen in 5 Hill 170: "It is said *de minimas non curat lux*. This maxim is never applied to the positive and wrongful invasion of another property. * * * The degree is wholly immaterial.

5.

Another question has been argued with great vigor by the counsel for the defendant in the different hearings of this case, and is pleaded in the second defense in the answer. It is claimed that the Central Ohio Railroad Company was incorporated by a special charter prior to the adoption of the present constitution of Ohio; that by its charter it was authorized to contract with any municipal authority for the use of streets, and that the defendant as lessee of said company and the said company made this

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SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1888. No. 213.

AMOS W. SHEPHERD, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR DEFENDANT IN ERROR.

JOHN K. COWEN,
HUGH L. BOND, JR.,
Counsel for Defendant in Error.

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STATEMENT OF THE CASE.

In the year 1868, the defendant in error, as the lessee of the Central Ohio Railroad Company, began the construction of the approach to its railroad bridge over the Ohio river at Bellaire, Ohio. This approach consisted in a railroad elevated on stone arches springing from stone pillars about twenty-seven feet apart, twelve feet wide, six feet thick and thirty feet in height. Under an agreement between the village of Bellaire and the Railroad Company this elevated road was built in the bed of First street, afterwards Thirty-first street. A short time before the completion of the elevated road, the plaintiff in error brought this suit to recover alleged damages to certain real estate which he claimed to own, situated south of Thirty-first street on Water street, afterwards

Union street, a street running at right angles to Thirty-first street. The lot claimed by the plaintiff in error had a front of thirty-three feet on Union street, beginning at the distance of thirty-three feet from the south side of Thirty-first street and running back about one hundred and twenty feet to an alley running parallel to Union street, between Thirty-first and Crescent streets.

In his petition, which will be found on pages 2 and 3 of the record, the plaintiff in error alleged :

1. Ownership of the property.

2. That all the streets and the alley before mentioned were common public highways of Bellaire, dedicated to a common and free use as public streets and highways.

3. "That the defendant, about the first day of April, 1868, and on divers other days and times since that day, unlawfully and injuriously, and without the license of the plaintiff and against his will, entered upon the said Water and First streets and made large excavations therein, and in the immediate vicinity of his said lots and improvements, and commenced constructing, and are still constructing, large stone pillars in said streets and across the said alley and in the immediate vicinity of his said lot and improvements, and are laying upon said pillars a railroad for the purpose of transporting over and along said streets by steam engines and cars, and carrying therein passengers, freight and stock over and along and across said streets and alley and in the immediate vicinity of his said lots and improvements ; that the said stone pillars are of the length of 12 feet, thickness of 6 feet, height 30 feet, and are about 27 feet apart, and that there are two of said pillars in said Water street and five in said First street and across said alley and in the immediate vicinity of said lots and improvements, as erected by said defendant; and the defendant was encumbering and obstructing the said streets and alley in the construction of said stone pillars in said streets during all the time aforesaid so as to deprive the plaintiff of his right to a free, safe and unobstructed passage into, along and upon said streets and alley, on foot and with his wagons, horses and carriages, to and from the said lots and improvements, and so as to deprive the plaintiff of his right to the free, safe and unobstructed use and benefit of said streets and alley

at the place and places aforesaid, and so as to deprive his said lots and improvements of the advantage of their former position. And that by reason of the premises the plaintiff's said lots and improvements have been and still are greatly injured and depreciated in value, and he has been and still is otherwise greatly injured to his damage $6,000."

The answer of the defendent (page 9 of the record) for first defense denies the plaintiff's ownership of the real estate described in the petition; denies "that the defendant wrongfully and unjustly intended to injure the plaintiff by entering upon said First street in making said excavations and erecting said abutments;" denies that it entered wrongfully and unjustly upon said street; denies that it so entered without the license and consent of the plaintiff; denies that it made said excavations and erected said abutments without the consent of the plaintiff, and that the passage to and from said property is unreasonably obstructed thereby; denies the injury to the plaintiff.

For a second defense it sets up the contract between it and the village of Bellaire, and alleges that the elevated railroad in First street was built under that agreement, by its authority, which was given at the request and with the consent of plaintiff who made no objection until the bringing of the suit.

The statute of Ohio, passed April 15, 1857, (Ohio Laws, vol. 54, p. 133, codified with some changes in section 3283 of the Revised Statutes of Ohio,) provides that "if it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley or public way, or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation, or public officer, or public authority, owning or having charge thereof, and the railroad company, to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; and if said parties shall be unable to agree thereon, and it shall be necessary in the judgment of the directors of such railroad company to use or occupy such road, street, alley, or public way or ground, such company may appropriate so much of the same as may be necessary for the purposes of such road, in the same manner and upon the same terms as is

provided for the appropriation of the property of individuals by the 10th section of this act; provided, that every railroad company laying down any such track or tracks upon any public street, road, alley, or other public ground, shall be responsible for *injuries* done to private property by such *location* lying upon or *near to* such public ground, which may be recovered by civil action brought by the owner or owners, at any time within two years from the completion of such track or tracks, before the proper court.

It is under this statute that the plaintiff in error claims the right to recover in this action. At the trial of the case the Circuit Court excluded all the testimony offered by the plaintiff, and directed a verdict for the defendant. The testimony offered will be stated fully hereafter.

The ruling of the Circuit Court is stated at page 18 of the record as follows:

"And thereupon, after full argument, the Court decided not to admit said testimony nor any part thereof, and ruled that damages to the rental value of the plaintiff's said property were not recoverable in this action, nor damages resulting from the placing of obstructions in Union street, in front of plaintiff's said property during the time of the building of said railroad as aforesaid, and that no recovery could be had by plaintiff for damages to his said property by reason of the building of said railroad as aforesaid in Thirty-first street. And the Court further decided that section 3283, Revised Statutes of Ohio (original enactment, vol. 54, page 133, section 12, Ohio Laws), does not enlarge or extend the liabilities of railroad companies, but only preserves the right of property owners to recover for injuries done to their property by the building of railroads under agreements made with municipal or other corporations, or public officers, or authorities, as provided in said section, precisely as if no such agreements had been made."

Points of Law.

The rulings of the Circuit Court raise the following points of law for the decision of this Court:

A. For what damage could the plaintiff seek a recovery in this action, under the pleadings and the statute of Ohio?

B. Was the testimony offered by plaintiff sufficient to entitle him to recover? that is, sufficient to enable the jury to find an injury done to the plaintiff by the defendant, for which recovery could be had in this action?

C. Was the plaintiff prejudiced by the rulings of the Circuit Court?

ARGUMENT.

A. It is submitted that under the pleadings the alleged injuries for which the plaintiff sought to recover were only those alleged to be done him by the location of the elevated railroad in Thirty-first street. That the petition was so understood by the defendant, is evident from the language of the answer. At the trial the plaintiff sought to offer testimony (Record pages 17 and 18) that during the construction of the elevated road in Thirty-first street, "Union street, for about one hundred feet south from Thirty-first street, towards Crescent street, was obstructed by stone, timber, rocks, derricks, steam engines, barrels, guy ropes, etc.; these obstructions extending past and in front of plaintiff's said property, on which was a two-story brick building." "A great part of the time, while the railroad was building, teams could not get to plaintiff's said property, because of said obstructions, and at times one could hardly get to it, or by it, on foot."

Counsel for plaintiff in error, in the brief filed in this Court, seeks the reversal of the ruling of the Circuit Court excluding this testimony, and takes the ground that although this obstruction of Union street in front of plaintiff's premises constituted a distinct cause of action from that given by the statute for the *location* of the road in Thirty-first street, yet the plaintiff was entitled to recover on both causes of action under the pleadings. The Court below excluded this testimony, on the ground that no such cause of action was set out in the petition, nor issue thereon raised by the pleadings. It is submitted that in this ruling the Circuit Court was clearly right. The petition complains of acts done by the defendant in Thirty-first street, at its intersection with Union street and elsewhere. The plaintiff in error now seeks to recover for alleged wrongful acts of the defendant done in Union street, at the distance of one hundred

feet from Thirty-first street, an entirely different *locus in quo*. The allegations of the petition were not sufficient to give the defendant notice of this claim. It is not a claim covered by the statute of Ohio which we have quoted, under which this action was brought. The issue raised on this cause of action would be whether the alleged use by the defendant of the bed of Union street was unreasonable or unreasonably prolonged. "The right of transit in the use of public highways is subject to such incidental, temporary or partial obstruction as manifest necessity requires, and among these are the temporary impediments necessarily occasioned in the building and repair of houses on lots fronting upon the streets of a city, and in the construction of sewers, cellar drains, &c. These are not invasions, but qualifications of the right of transit on a public highway, and the limitation on them is that they must not be unnecessarily and unreasonably interposed or prolonged." Clark vs. Fry, 8 Ohio St. Rep., 358.

The same case decides that such temporary obstructions upon a highway, when guarded with due care to prevent damages to the public, and not unnecessarily extended or continued, are not nuisances and do not require a license from the municipal authority to legalize them.

That such claims are not contemplated by the act of 1857, which we have quoted, is evident from the language of the proviso, which gives damages only for injuries done by the *location* of the railroad on the public property, and is conclusively established by the decision of the Supreme Court of Ohio, rendered since the trial of this case below, in the case of Railway Company vs. Gardner, 45 Ohio St. Rep., 309, which holds that the measure of damages in an action under the statute is the difference between the value of the property before the location of the railroad and its value after such location.

We return, then, to the question, For what kind of damage may a recovery be had under the act of 1857? The answer to this question depends on the meaning of the word "injuries" in the proviso, that the railroad company "shall be responsible for injuries done to private property by such location lying upon or near to such public ground."

In legal language, the word "injury" means the invasion of another's right. As applied to an act, it means

an act by which another's right is invaded. Since by definition of the word right, every invasion of a right must be a wrong actionable at suit of the person whose right is invaded, the practical test to determine whether any act constitutes an injury to a particular person is the actionability of the act at the suit of that person.

The provision in question must therefore be interpreted as if it read thus: "Every railroad company laying down any such track or tracks upon any public street, &c., shall be responsible for actionable wrongs done to private property by such location lying upon or near to such public ground," &c., &c.

That is to say, the effect of the proviso of the statute is to give to the owner of private property an action thereunder for all damages for which, but for the authority conferred on the railroad company by the act, he could have sued. In short, the statute, with the proviso, left the property owner's rights of action unabridged, but it in no way added to them. This interpretation of of the act is the same given by the Supreme Court of Pennsylvania, in Penna. R. R. Co. vs. Lippincott, 116 Pa. St., 472, and Id. vs. Marchant, 119 Pa. St., 541, to the provision of the Constitution of that State that "private property shall not be taken, *injured* or destroyed," without compensation, and that given by the Courts of Massachusetts and Minnesota to their respective laws, providing that private property shall not be "injuriously affected." Rochette vs. Chicago, &c., Ry. Co. (Minn.), 17 Am. & Eng. Rwy. Cas., 192, and Editor's Note; Proprietors of Locks, &c., vs. N. & L. R. R. Co., 10 Cush., 385.

It is in accord also with the interpretation given by the Supreme Court of Ohio to section 3283, in Railway Company vs. Gardner, 45 Ohio St. 309.

Now, the acts of the defendant complained of here, constitute a partial obstruction of a public street. For such an obstruction an individual can maintain an action only in one of two cases, viz: (1) in case the obstruction is not only a common or public nuisance, but also an invasion of some private right of his own, or (2) in case such obstruction, though only a public nuisance, has caused him special damage.

And the second case is further limited by the statute through the requirement that the special damage must

be damage *in respect of the private property.* That is to say, no action could be maintained under the statute for special damage in the nature of personal loss or inconvenience.

B. 1. *Was the testimony offered by the plaintiff sufficient to enable the jury to find an invasion by the defendant of the private property rights of the plaintiff? or to find special damage to him in respect of his private property?*

The testimony of James B. Darragh (Record, page 17), so far as it related to damage done the plaintiff's property by the location and construction of the elevated railroad in the bed of Thirty-first street, was all of it improper and inadmissible under the decision in Railway Company vs. Gardner, *supra.*

Even had Darragh's testimony been in proper form, it would have tended to prove only, to quote the language of the plaintiff's offer of proof (Record, page 18), "that the building of said pillars, and the archway connecting the same, at the intersection of Union and Thirty-first streets, damaged the *access* to plaintiff's said property from Union street, and the building of the railroad as aforesaid in Thirty-first street, west of Union street, damaged plaintiff's *access* to his said property through the alley aforesaid in the rear, and depreciated the market value in the sum claimed in the petition." In short, the claim is that by reason of acts done in Thirty-first street the *access* to the plaintiff's property is damaged.

But this "access" is nothing more than the right of the plaintiff and other persons as members of the community to use Thirty-first street as a public highway. The plaintiff had no right or interest in the bed of Thirty-first street as distinct from the right of the public to use it as a street. It is true that under the law of Ohio, the rights of owners of property abutting on a street are greater than under the laws of most of the other States, but even under the Ohio decisions the plaintiff can claim no private right or interest in the bed of Thirty-first street.

"Distinct from the right of the public to use a street, is the right and interest of the owners of lots adjacent. The latter have a peculiar interest in the street, which

neither the local nor the general public can pretend to claim; a private right of the nature of an incorporeal hereditament legally attached to their contiguous grounds, and the erections thereon; an incidental title to certain facilities and franchises, assured to them by contracts and by law, and without which their property would be comparatively of little value. This easement, appendant to the lots, unlike any right of one lot-owner in the lot of another, is as much property as the lot itself." Crawford vs. Delaware, 7th Ohio St. Rep. 469.

"The private rights of the owner of lands in the adjacent highways, upon principle, are the same as those of the owner of lots in towns to the adjacent streets. In either case they are, to a great extent, modified by attending circumstances. Such owner has a private right of access to and from the street or highway; and, when he has made improvements on his land, with direct reference to the adjoining highway as then established, and with reasonable reference to its prospective improvement and enjoyment by the public, he has a private right of way, or passage, to and from the highway as it then exists; and any substantial change in the highway, to the injury of such passage or way, is an invasion of his private property; and this private right extends so far as the reasonable and convenient enjoyment of such improvements requires the use of the adjacent highway; but, beyond such necessary use thereof, the private right is merged in that of the public. Especially must this be so when, as in this case, the alteration of the road complained of is not adjoining the lands of the plaintiff, and the injury thereto is, at most, remote and consequential. —Jackson vs. Jackson, 16 Ohio St. Rep. 168.

Under the Ohio decisions, therefore, it is clear that no private property rights of the plaintiff were invaded by the erection of the railroad structure in the bed of Thirty-first street.

2. *Could the jury find special damage?*

In such a case as this the special damage is the gist of the action. Unless such damage is shown, there is no cause of action. Not only must the damage be peculiar to the plaintiff's property, of a different character and

apart from that which the public in general sustain (City of Georgetown vs. Alexandria Canal Co., 12 Pet. 91), but it must be actual, substantial and proximate. This is not a case wherein there is an injury from which damage is presumed in law, but without actual, substantial and proximate damage there is no injury. (Wood, Law of Nuisances, chap. 18, secs. 618, 619, *et seq.*). The damages claimed by the plaintiff here are for the *permanent depreciation* of the value of his property fronting on Union street by the erection in the bed of Thirty-first street of stone arches 30 feet high, with a span of 27 feet, on pillars 12 by 6 feet. The only connection suggested between the erection and the alleged depreciation of the value of plaintiff's property consists in the statement that the erection "damaged the plaintiff's *access* to his said property." But this "access" is nothing more than the use of the public easement. The alleged damage is the same in kind as that suffered by all the other owners of property in the village. The mere fact that the plaintiff's property lies nearer than that of some others, does not make the partial obstruction a special damage to him.—Blackwell vs. Old Colony R. R. Co., 122 Mass. 1; Prop. of Locks, etc., vs. N. & L. Ry. Co., 10 Cush., 385; Rochette vs. Chicago, &c., Ry. Co. (Minn.), 17 Am. and Eng. Ry. Cas., 192, 194, and note; Caledonian Ry. Co. vs. Ogilvy, 2 Macq. 229; Pierce vs. Dart, 7 Cow. (N. Y.) 609; Houck vs. Waucher, 34 Md. 265; Sargent vs. O. & M. R. R. Co. (Sup. Ct. of Cincinnati), 1 H. 52, 59; Wood, Law of Nuisances, ch. 18, Review of Cases; Pgh. & L. E. R. R. Co. vs. Jones, 111 Pa. St. 204.

C. There is still another question which may be properly presented here with reference to this record, and that is, that the plaintiff was not prejudiced by the ruling of the Court below, for the reason that the testimony of Darragh and the offers by the plaintiff of other testimony went only to the question of damages, and not to the right of the plaintiff to recover. Before the plaintiff could be entitled to a verdict, it was necessary for him to prove substantially all of the avertments of his petition, and especially that he was the owner of the property.

The plaintiff's ownership of the property mentioned in

the petition was expressly denied in the first answer of the defendant, and without proof of such ownership the plaintiff was not entitled to a verdict, and it was entirely proper for the Court to direct a verdict in favor of the defendant—the bill of exceptions showing expressly that no other or further testimony was offered by the plaintiff other than that of Darragh and the proposal of the plaintiff to prove certain other matters.

Under these circumstances, it is respectfully submitted that the Court did not err in directing a verdict in favor of the defendant, and that no error intervened to the prejudice of the plaintiff by the rejection of the testimony offered by him.

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